

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Review of the Commission's)
Regulations Governing Broadcast)
Television Advertising)

MM Docket No. 95-90

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REPLY COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

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REPLY COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

The rep rule and the station rate rule represent all that is wrong with government regulation. It has been clear for more than 15 years that these rules have no justification in the modern communications marketplace. Yet they have hung on -- without policy justification -- because they happen to confer competitive protections and benefits to private interests who have lobbied effectively for their preservation. In 1980, on the basis of exhaustive, independent study, the Commission's Network Inquiry Special Staff (NISS) recommended repeal of the station rep rule, stating

"[T]he Commission's goals of competition, diversity, and localism would best be served in the long term by a repeal of this rule..."¹

The NISS found that the rule did nothing to foster diversity or localism, and that its contribution to competition was questionable. The NISS believed that repeal of the rep rule

¹

New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report (October, 1980). p. 498.

could increase efficiencies, reduce national spot rates and "move the network and its affiliates closer to the joint profit-maximizing number of clearances."²

Yet the rule remains in place, even though seismic changes that have occurred in the marketplace since the NISS study cry out for the elimination of this outdated and unnecessary restriction. Today this rule is nothing more than governmental protection for existing rep firms, without any justification.

The same goes for the rate rule, which dates back to 1941. NBC's initial comments demonstrate that networks have neither the power nor the incentive to manipulate their affiliates' spot advertising rates to above competitive levels. Even if this were not the fact, the antitrust laws provide adequate protection for affiliates and advertisers. The expert economist retained by the proponents of the rules concedes that the rate rule is "akin to the simple prohibition against horizontal price fixing by the antitrust laws."³ There is no reason for duplicative FCC regulations.

The proponents of the station rate and network rep rules

² Id. at p. 497.

³ Frederick R. Warren-Boulton, "An Economic Analysis of the Competitive Effects of Eliminating the Network Representation Rule," submitted with the Comments of the Stations Representatives Association, p. 11.

have not offered a single convincing factual or policy-based rationale for retention of these restrictions. Their arguments are based instead on a preposterous and jerry-built series of invalid assumptions that cannot withstand independent analysis.

Networks do not have the power to coerce their affiliates.

Virtually all the comments urging retention of the rules claim that a network retains the power to coerce its affiliates to hire the network as a national advertising sales representative. There is absolutely no basis for this contention. In fact, the record explicitly contradicts it. According to the record upon which the Commission relied when it adopted the prohibition in 1959, before adoption of the rep rule, ABC wasn't in the rep business at all, NBC repped only 6 affiliated stations that it did not own, and CBS repped only 7 stations it did not own. Together NBC and CBS repped 3% of their combined independently-owned affiliated stations. There was no evidence that affiliations were "tied" to these few stations' willingness to be repped by the network.⁴

These were the facts when there were only three networks (and ABC was barely competitive), and only 500 television stations on the air. The proponents of the rules offer speculation and conjecture, but no contrary evidence to show that

⁴ National Spot Sales Representation, 19 RR 1501, 1512 (1959).

network coercion is remotely likely to occur in today's highly competitive marketplace. In 1995, networks have far less power over their affiliates than they did over 40 years ago. Based on the facts before it in the Prime Time Access Rule proceeding, including the existence of six broadcast networks and a vibrant syndication market, the Commission has explicitly acknowledged this shift in bargaining power.⁵ The record shows that networks did not use their much greater power to force affiliates into a rep relationship 35 years ago. Today they don't even have such power.

Network reps will not give their clients bad advice in order to increase network clearances. Another universal but bogus claim advanced by the rules' proponents is that repeal of the rep rule will undermine localism. Their theory is that a network rep has an inevitable conflict of interest which will cause it to give affiliate clients bad or inaccurate advice about programming in order to assure or increase the clearance of network shows.

This falsely assumes enormous naivete and ignorance among affiliates. Owners of affiliated stations are sophisticated, experienced broadcasters and businesspeople. Information about programming is available to them from many sources other than their rep firms, including ratings services, consultants,

⁵ Report and Order in re Review of the Prime Time Access Rule, MM Docket No. 94-123 (July 31, 1995) at par. 114.

industry groups and even the trade press. An affiliate repped by a network-owned company is obviously aware of the potential conflict, and will be highly suspect of advice that is inconsistent with the affiliate's own judgments and the information available elsewhere.

The Commission reached this conclusion in 1981 when it eliminated its Golden West policy, a restriction analogous to the rep rule which prohibited a national or regional sales representative that was owned by a licensee from representing other stations in the same market. In response to the claim that eliminating the ban would reduce programming diversity because of the influence sales reps had over stations' programming decisions, the Commission found that there was no evidence that rep firms forced advice on their station clients. Rather the station typically solicited the advice. If the station believed it was receiving bad advice, "it almost always has the choice of a different rep organization. It can also retain programming consultants that are not associated with rep organizations or it can go it alone."⁶

These observations hold true for the advice offered by a network rep. Moreover, non-network rep firms have historically

⁶ In the Matter of Representation of Stations by Representatives Owned by Competing Stations in the Same Area, (Golden West Policy), 49 RR2d 1705, 1714 (1981).

also been in the business of providing programming to stations.⁷ There has never been a suggestion that their advice about program strategy is biased or unreliable, or that they should be prohibited from offering rep services to stations who carried their programs.

In short, there is no logical nexus between repeal of the rate and rep rules and loss of affiliate programming independence, and the rules' proponents offer none. If a network had the power to force clearances or force affiliates to accept syndicated programming in which the network had an interest, it would exercise that power directly, rather than use the circuitous strategy of offering affiliates transparently bad advice.⁸ As NBC demonstrated in the Prime Time Access Rule and other proceedings before the Commission, the networks do not have the ability to force affiliates to clear programs they do not want.

Other than the bogus "advice" theory, the proponents offer

⁷ Two of the largest independent rep firms, Blair and Telerep, have had active program syndication businesses for many years.

⁸ In its September 6, 1995 Report and Order accelerating the sunset of the financial interest and syndication rules, the Commission acknowledged that there is no evidence networks exercise power in the syndication market that would enable them to force affiliates to accept their programs. (In re review of the Syndication and Financial Interest Rules, MM Docket No. 95-39, par. 16).

nothing to demonstrate why repeal would increase network leverage with respect to program clearances. If a network rep provides biased information it does so at its peril. The affiliate will quickly become aware of the problem and will not follow the advice or, more likely, will hire another rep.

Repeal of the rep rule will not destroy the independent rep industry. This doomsday scenario predicts the "evisceration" of the independent rep business because (1) most affiliates will be forced to choose their networks as sales representative; (2) independent rep firms will fail for lack of clients; and (3) independent stations will have few or no independent rep firms to choose from. Once again, the facts expose the absurdity of these predictions.

First, when NBC and CBS were in the rep business prior to 1959, they boasted only 3% of their affiliates as clients. Obviously, a successful and competitive independent rep industry existed even in the bad old days when networks were considered "dominant." Second, there are three times as many commercial stations on the air today than in 1959, including at least 450 independent stations -- more than enough to support more competition in the rep business. Finally, the scenario painted by the rules' proponents is predicated on the assumption that networks can force their affiliates into a rep relationship, which we have demonstrated is not the case.

Repeal of the rep and rate rules will not reduce competition in the advertising market. The claim that elimination of the rules at issue in this proceeding will adversely affect competition in the national advertising market is squarely refuted in NBC's initial comments, where we demonstrated that marketplace changes, including the manner in which network advertising is sold, have made station ad rate manipulation by networks both impossible and unprofitable. None of the proponents of the rules has offered any evidence or analysis to refute that conclusion. They predict that without the restrictions networks will control affiliate ad pricing, will ensure national spot ads are priced higher than network ads and will take steps to ensure that more network time is sold than spot. However, they fail to explain how networks will successfully accomplish these feats when there are so many other video and non-video advertising vehicles competing for the available pool of national advertising dollars.

Frederick Warren-Boulton, the economist hired by SRA, attempts to provide an econometric explanation of why spot prices will rise if the rep rule is repealed. But his analysis, like the arguments of the rules' proponents, is based on a series of assumptions which simply don't hold water. For example, Warren-Boulton states that without the rep rule prices will rise "if networks gain significant control over pricing of their affiliates' ad time" (p. 3). A few pages later, however, he

concedes that ad sales representation does not give a network direct control over a station's spot pricing (p. 15).⁹ Warren-Boulton's conclusions are also based on the premise that networks will represent "many of their affiliates" (p. 8), an assumption which, as we have demonstrated, has no basis and is in fact contrary to the historical record. Warren-Boulton also argues that networks have the incentive to impede substitution between network and spot time, so that the latter will be a less formidable competitor to the former. But he never explains how, absent collusion among the networks, any single network could successfully achieve this objective in a marketplace where it is competing with five other broadcast networks, 1300 stations with which it is not affiliated, cable networks and barter syndication.¹⁰

⁹ Pappas Stations, which opposes repeal of the rule, asserts that, while there is consultation between a station and its rep, it is the individual station, not the rep, that sets national spot ad rates. (Comments of Pappas Stations Partnership, p. 7). Neither Warren-Boulton, nor any other proponent of the rules, explains why a network-owned rep would have any different relationship with its clients. As the Commission stated in Golden West, "It is ultimately in the best interest of the representative organization to maximize profits for any stations it represents..." (49 RR2d at 1715).

¹⁰ Warren-Boulton argues that there is "empirical evidence" that discredits the NISS findings that national spot prices in markets that included a network owned station (where the parent network presumably had influence over the station's spot pricing) were lower than in markets that did not have a network O&O. The NISS believed this supported the notion that pricing might be lower in markets where affiliates were repped by a network. All Warren-Boulton does is to cite to a later study which reached a different conclusion about O&O markets. At best, Warren-Boulton has merely pointed out that there is

* * *

NBC demonstrated in its initial comments that the rate rule and the rep rule were unnecessary to protect competition and affiliate independence. We also argued that, as the NISS determined 15 years ago, the rep rule in particular prevents efficiencies and synergies that would benefit affiliates and advertisers. None of the proponents of the rules has presented facts or arguments that show retention of these restrictions

conflicting economic research on a question he admits does not directly test the effect of elimination of the rep rule.

would serve any public interest purpose. Accordingly, both rules should be immediately repealed.

Respectfully submitted,



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